89- 1497

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL JR.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FARAG M. MOHAMMED SALTANY,
as personal representative of
KHLOUD HASAN AL-ORAIBI, deceased, and
HASAN MOHAMED AL-ORAIBI, deceased, et al.,

Petitioners,

vs.

RONALD W. REAGAN,
President of the United States, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the President, executives or officers of the United States who ordered, planned and conducted an attempted assassination of a foreign leader and intentional killing of civilians by illegal surprise nighttime aerial bombardment of foreign cities in time of peace without constitutional or statutory authority for the purpose of overthrowing a foreign government are protected from liability for damages by doctrines of immunity.

2. Whether Federal Tort Claims Act exceptions to the waiver of sovereign immunity by the United States relating to discretionary functions, claims arising from combat activity in time of war, or claims arising in a foreign country apply when the acts complained of include the illegal peacetime surprise aerial

bombardment of foreign cities for the purpose of assassinating the head of state and killing and injuring civilians where planning, preparation including movement of personnel and military equipment and the orders by the President took place in the United States.

3. Whether the Foreign Sovereign Immunities Act, the Act of State doctrine, or a suggestion of immunity by the Department of State pursuant to 28 U.S.C. §517 provide immunity from liability for a foreign government, or its head of government who acted in concert with the President and at his request in an attempt to assassinate a foreign leader and kill and injure civilians in foreign cities by illegal surprise aerial bombardment in time of peace.

4. Whether this complaint against the United States, the United Kingdom and responsible executives and officers brought on behalf of civilians living in Tripoli and

Benghazi, Libya who were killed or injured in the illegal surprise nighttime bombing of their homes by U.S. military aircraft without constitutional or statutory authority is frivolous and justifies sanctions under Rule 11, Fed.R.Civ.P., or Rule 38, Fed.R.App.P.

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OPINIONS IN THE CASE

The opinion of the Court of Appeals on sanctions is reported, 886 F.2d 438, A3, as is the Court's order, id, at 441, A1. The memorandum and order of the District Court is reported, 702 F.Supp. 319, A9.

JURISDICTIONAL GROUNDS IN THIS COURT

The per curiam order and opinion sought to be reviewed were entered on September 29, 1989, A1 and A3. A per curiam order denying petitioners' timely petition for rehearing was entered on December 22, 1989, A21. A suggestion for rehearing en banc was denied by the Court en banc by order entered on December 22, 1989, A22. This order noted that Chief Judge Wald and Circuit Judges Mikva and Ruth B. Ginsburg would grant the suggestion in part, limited to the issue of sanctions. 28 U.S.C. §1254(1) is the statutory provision that confers jurisdiction on this Court to review this case by writ of certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES & REGULATIONS INVOLVED IN THE CASE

This case turns on the validity or correct interpretation or application of the following constitutional provisions, treaties, statutes, regulations and laws of war among others:

U.S. Constitution, Art. II, sec. 3; Art. I, sec. 8, clauses 10 and 11; The Charter of the International Military Tribunal, the Nuremberg Charter, Judgment and Principles, See the London Agreement on War Criminals, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 6 F.R.D. 69 (1946), Yearbook of International Law Commission 374-80 (1950); The General Assembly Resolution adopting the Nuremberg Charter Principles, G.A. Res. 95(1), U.N. Doc. A/64/Add.1 (1946); the 1907 Hague Convention on the Opening of Hostilities; the Paris Peace Pact of 1928; the United Nations Charter; U.N. General Assembly

resolution 2625, 24 October 1970; the Universal Declaration of Human Rights; the Geneva Convention for the protection of civilians (1949); the Annexed Regulations to Hague Convention No. IV of 1907; Hague Convention No. IX of 1907 concerning bombardment by naval forces in time of war; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (New York 1973); the Alien Tort Statute, 28 U.S.C. 1350; Federal Tort Claims Act, principally 28 U.S.C. 1346(b), 2401(b), 2402, 2671-80; Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602-11; the Racketeer Influenced and Corrupt Organizations Act (RICO); 18 U.S.C. 1961 et seq.; the Foreign Claims Act, 10 U.S.C. 2734; 28 U.S.C. 517; the international law of armed conflict; Executive Order No. 12333; The U.S. Air Force Manual, International Law -- The Conduct of Armed Conflict and Air Operations

(AF 110-31, 19 Nov. 1976), Para. 5-3; The Commander's Handbook on the Law of Naval Operations (Naval Warfare Publication 9, 1987) Chap. 8; and U.S. Army Field Manual 27-10: The Law of Land Warfare (1956).

STATEMENT OF THE CASE

At about 2 a.m. on April 15, 1986 United States Air Force and Navy aircraft carried out a surprise bombing attack on the cities of Tripoli and Benghazi in Libya. Air Force F-111's flew from U.S. bases in England over the Atlantic, around Europe, through the Straits of Gibraltar and over the Mediterranean while more than 70 Navy planes flew from aircraft carriers in the Mediterranean to attack sleeping cities.

The purpose of the attack, as alleged in the complaint, was to assassinate Muammar Qaddafi, the head of state of Libya, and to terrorize Libyans by inflicting injury on the civilian population to encourage his

overthrow. The bombing resulted in scores of civilian deaths and injuries in Tripoli and Benghazi.

The secrecy, surprise nature, destruction of civilian areas, deaths of civilians and intent to assassinate Qaddafi were widely reported in the U.S. media and in books by nationally known reporters including the New York Times, the Washington Post, the Wall Street Journal, and C.B.S. news. See e.g. "Target Qaddafi", Seymour M. Hersh, New York Times Magazine, February 22, 1987; Veil: The Secret Wars of the CIA, by Bob Woodward, Pocket Books, 1987; Best Laid Plans, by David C. Martin and John Walcott, Harper and Row, 1988.

Margaret Thatcher, Prime Minister of the United Kingdom, gave permission for the use of U.S. bases in the United Kingdom, approved the targets knowing the attack was illegal and would kill civilians. A39. See also Reagan Raiders, Newsweek, April 28,

1986 at 26. Other nations refused requests from the U.S. to participate in the attack or permit aircraft to fly over their territory for the purpose.

Justification for the attack was allegations by the United States that Libya was responsible for the bombing of a West Berlin disco on April 5, 1986 in which two American soldiers were killed among many other casualties. The President of the United States, who personally ordered the raid, cited Article 51 of the United Nations Charter as authority to conduct the attack to protect U.S. lives and property against acts of terrorism. Officials of the West Berlin Police Department and the Federal Republic of Germany publicly disputed the U.S. allegation that Libya was responsible for the disco bombing and prosecuted defendants with no known connection with Libya, but with Syrian connections. Officials of the United States, including

defendant William J. Casey, publicly stated there were extensive disinformation campaigns against Libya in relation to the attack.

Petitioners are fifty-five men, women and children, or their estates, who were killed or injured in the bombing attacks. A second complaint containing identical allegations was filed on behalf of two hundred eighty additional individuals and is pending in U.S. District Ccurt awaiting the outcome of this petition. Dakhil v. Reagan, No. 89-1074 (LFO) D.D.C.

The complaint alleged violations of the law of nations, international laws, the Constitution, laws and treaties of the United States, various state and foreign laws asserted under the Federal Tort Claims Act, the Alien Tort statute, the Foreign Claims Act and RICO. Laws violated were identified in paragraphs 1, 3, 4, 5, 33, 37, 41, 43, and 46-50 of the complaint. These

included violations of settled principles of international law prohibiting the use of force by a state against the territorial integrity or political independence of another state, requiring settlement of international disputes by peaceful means, prohibiting armed attacks by a state against civilians and crimes against heads of state and other internationally protected persons. These principles are established by the United Nations Charter, U.N. General Assembly resolution 2625 (24 October 1970), "Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations," the Universal Declaration of Human Rights, the international law of armed conflict, the Charter of the International Military Tribunal (Nuremberg Charter), the General Assembly Resolution adopting the Nuremberg Charter Principles, the Geneva Convention

for the Protection of Civilians (1949), the Annexed Regulations to Hague Convention No. IV of 1907, Hague Convention No. IX of 1907 concerning Bombardment by Naval Forces in Time of War, The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (New York 1973), and other agreements, resolutions, treaties, declarations, documents and practices constituting the customary international law of human rights and law of nations. It was alleged that neither the United States nor the United Kingdom can invoke sovereign immunity under domestic law as a bar to the jurisdiction of this Court or as a defense on the merits.

Among Constitutional, statutory and other laws alleged to have been violated were the absence of constitutional and statutory authorization to commit the acts alleged, and violations of Art. II, Sec. 3, commanding the President and other officials

to take care that laws be faithfully executed, U.S. Const. Art. I, Sec. 8, conferring exclusive power on Congress to declare war, clause 11, and to define and punish offenses against the Law of Nations, clause 10; the criminal laws of the United States, including among others, 18 U.S.C. 956, 960 and 371, and the criminal laws of the District of Columbia, Virginia, California and other States; Executive Order No. 12333, promulgated by President Reagan, prohibiting U.S. employees from engaging in, or conspiring to engage in, assassination; directives of the Secretary of Defense and the Judge Advocates General of the Air Force and Navy, giving effect to the international prohibitions against armed attacks directed at civilians, e.g. the U.S. Air Force Manual, International Law -- The Conduct of Armed Conflict and Air Operations (AF 110-31, 19 Nov. 1976), para. 5-3; The Commander's Handbook on the Law of Naval

Operations (Naval Warfare Publication 9, 1987) Chap. 8 and provisions of the Code of Military Justice which make clear that the only military orders which must be obeyed are orders which are lawful, see e.g. 10 U.S.C. 892, providing punishment for failure "to obey any lawful general order or regulations..." and that obedience to an order to commit a criminal or unlawful act is no defense; and the laws of Libya.

Written claims by or on behalf of each of the petitioners were filed in April, May and June, 1987 with the Office of the White House and the United States Department of Defense in accordance with the prescribed procedures for the filing of claims under the Federal Tort Claims Act. The Department of Defense referred the claims that were filed with it to the Department of the Air Force. The Air Force considered the claims under the Foreign Claims Act, 10 U.S.C. 2734, and denied them as such by letter

dated October 16, 1987. No denial or notice of any other action taken on the claims filed with the Office of the White House was received.

A complaint was filed in the U.S. District Court for the District of Columbia on April 13, 1988.

Defendants filed motions for dismissal before answer. The District Court froze discovery and all further activity in the case and set a briefing schedule on the motions to dismiss. The parties filed extensive briefs on the issues. Petitioners filed 123 pages of supporting affidavits by two international law experts, analyzing provisions and principles of international law binding the defendants, on which they relied. Oral argument was heard on December 16, 1988. On December 23, 1988, the District Court dismissed all the claims in a seven page memorandum and order. A9.

The District Court held the United

States had not waived sovereign immunity. It disposed of the Federal Tort Claims Act, Alien Tort Claims Act, Foreign Claims Act, and RICO with one sentence each, all in a single footnote. A16. It held the President, acting in his capacity as commander in Chief under Article II, section 2 of the Constitution, had absolute immunity, citing only Nixon v. Fitzgerald, 475 U.S. 731 (1982). As to all other U.S. defendants from the Secretary of Defense to the bomber pilots, it held "each acted, as duty required, in accordance with the orders of the commander in Chief or a superior officer" and is "entitled to immunity from this suit, whether immunity is classified as absolute or qualified, and whatever the origins of the rights plaintiffs claim may have been violated" citing only Harlow v. Fitzgerald, 457 U.S. 800 (1982). A17-18.

The District Court held the act of state doctrine compelled dismissal of the

United Kingdom and that the State Department suggestion of immunity for Mrs. Thatcher was conclusive.

The District Court stated in a footnote that it was bound by the rule that all well-pleaded factual allegations of the complaint must be taken as true, that petitioners were entitled to all favorable inferences therefrom and that the complaint may not be dismissed unless it appeared beyond doubt that petitioners could prove no set of facts which would entitle them to relief. All. It nevertheless found in direct contradiction of the complaint that the President acted in his capacity as commander in chief and pursuant to Article 51 of the United Nations Charter to protect U.S. lives and property against acts of terrorism.

The District Court did not address any allegation of violations of legal rights, made no effort to analyze international law authorities presented in support of

petitioners' claims and ignored constitutional claims alleged, briefed and argued such as as rights under Bivens v. Six Unknown Agents 403 U.S. 388 (1971).

Claims for sanctions by the defendants were denied on the grounds that the case was not so much frivolous, as audacious, adding U.S. courts should serve in some respects as a forum for public statement of protest.

Petitioners appealed, 89-5051, and cross-appeals were taken by the United States, 89-5052, which later withdrew its cross-appeal, and by the United Kingdom and Mrs. Thatcher, 89-5053. These appeals were consolidated by the Court sua sponte. Before the record on appeal or briefs were permitted to be filed, defendants moved for summary disposition. Under the rules governing motion practice, petitioners were permitted a limited written response and no oral argument.

The dismissal by the District Court was

affirmed without opinion, per curiam, by a panel consisting of Judges Buckley, D.H Ginsburg and Sentelle.

The cross appeal of the United Kingdom and Mrs. Thatcher from the denial of sanctions under Rule 11, Fed.R.Civ.P. was reversed and the United Kingdom's motion for attorneys fees and costs under Rule 38 Fed.R.App.P. was granted. The Court of Appeals taxed attorneys fees and costs on appeal in the amount of $16,852.07 jointly and severally against petitioners' attorneys. It remanded to the District Court for imposition of appropriate sanctions there despite its reliance on Argentine Republic v. Amerada Hess Corp., 488 U.S. ___ (1989) which reversed the U.S. Court of Appeals decision in Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2nd Cir. 1987) after the decision of the District Court in this case.

Petitioners' request for rehearing and

suggestion for rehearing en banc were denied, A21,23, with Judges Wald, Mikva and Ruth. B. Ginsberg voting to grant en banc review on the issue of sanctions.

REASONS FOR GRANTING THE WRIT

Inherent in the idea of constitutional government and the rule of law is the principle that agents of "government may act only as the Constitution authorizes, whether the actions in question are foreign, or domestic." See, Reid v. Covert, 354 U.S. 1, 6 (1957); United States v. Verduzo-Urdiquez, 58 U.S.L.W. 4263, 4268 (1990) (Kennedy, J. concurring.)

Also inherent is the principle "no man, not even the President of the United States, is absolutely and fully above the law." Nixon v. Fitzgerald, 457 U.S. 731, 797 (1982) (Blackmun, J., dissenting.)

The Constitution and laws of the United States by "[D]octrines such as official immunity have long protected

Government agents from any undue chill on the exercise of lawful discretion." United States v. Verdugo-Urdiquez, supra at 4272. (Brennan, J. dissenting.)

The question here, never addressed by the courts below, is whether there was lawful discretion to commit the acts complained of. The District Court wrote only that the President acted as commander-in-chief of the armed forces under Article II, section 2, with absolute immunity, and pursuant to Article 51 of the United Nations Charter to protect U.S. lives and property against acts of terrorism, A9,16. The Court of Appeals wrote nothing. Both statements are in conflict with the allegations of the Complaint and were made without taking evidence or providing any analysis or reason in their support.

If all uses of military force ordered by the President are covered with absolute immunity, then the Constitution offers no

judicial protection from his absolute discretion. He may act as he chooses with military force absolutely and fully above the laws insofar as judicial powers under Article III of the Constitution are concerned. The principle of Marbury v. Madison, 1 Cranch 137 (1803), assuring judicial protection of a government of laws under constitutional limitations which has heretofore prevented legislative and executive action in violation of the Constitution and laws of the United States is, in effect, held inapplicable in the most dangerous of all acts of government, illegal uses of military force in unauthorized acts of violence and war.

The Courts below never addressed a single alleged violation of right from the many claimed by petitioners to arise from the constitution, international law, federal statutes, foreign and state laws, judicial rulings and even Presidential Executive

Order 12333, sec. 2.11 Prohibition of Assassination. The Courts below denied petitioners "[T]he very essence of civil liberty [which] certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch at 163.

Article 51 of the United Nations Charter reads in part, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

A bomb explosion in a West Berlin disco on April 5, 1986 which killed a Turkish woman and two American soldiers was attributed to Libya by the U.S. This was the "armed attack" President Reagan cited as

creating the right to bomb civilians on another continent ten days later in "self-defense" under Article 51. South Africa promptly asserted that this same right supported their repeated military attacks against Angola.

Such an unprecedented and unsupportable interpretation of a document ordained "to save succeeding generations from the scourge of war", would make the U.N.Charter itself a threat to peace.

This is an important case in historic, human and legal terms. The attempted assassination of a foreign head of state, the intentional killing and injury of civilians and destruction of residential areas of foreign cities by surprise, covert bombing to overthrow a foreign government in peacetime are unprecedented in U.S. history. The law applicable to such facts is extremely complex, diffuse, obscure and unsettled. The courts below have summarily

dismissed the complaint branding it audacious and sanctioning the attorneys who brought it.

1. There was no immunity for the President and the executives and officers who participated in the acts alleged.

At the Constitutional Convention, delegate George Mason asked whether "...any man [shall] be above Justice" and then argued that such a state was least appropriate for the man "who can commit the most extensive injustice."

Early in our constitutional history, Chief Justice Marshall wrote,

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

Marbury v. Madison, 1 Cranch 137, 163 (1803).

The Chief Justice continued,

> "...the question, whether the legality of an act of the head of a department be examinable in a court

> of justice or not, must always depend on the nature of that act."

Id. at 165.

The following year, Chief Justice Marshall addressed the right of aliens to recover damages for alleged injuries caused by the illegal seizure on order of the President of their ship, the Flying Fish, during the Congressional wartime suspension of intercourse between France and the United States. Little v. Barreme, 2 Cranch 170, 179 (1804).

The Chief Justice for a unanimous Supreme Court held that a commander of a ship of war of the United States in obeying instructions from the President of the United States acts at his peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution. Damages were assessed for the loss of the use of the ships and cargo.

Nearly one hundred fifty years later,

in his concurring opinion in Youngstown Steel and Tube Co. v. Sawyer, 343 U.S. 579, at 661 (1951), Justice Clark, referring to Little v. Barreme wrote, "I know of no subsequent holding of this Court to the contrary." Butz v. Economou, confirmed the absence of a contrary holding twenty-seven years later. 438 U.S. 478, 490 (1978). Until this day, there has been none.

It is instructive to remember how an earlier President acted under similar circumstances, and before Marbury v. Madison and Little v. Barreme. After the Bey of Tunis declared war on the United States, President Jefferson, having insisted on and obtained specific legislative authority from the Congress, sent a squadron of frigates to the Mediterranean to protect American shipping. As the ships entered the Mediterranean a tender schooner, the U.S.S. Enterprise, was attacked by a Barbary cruiser from Tripoli

which it overwhelmed and captured.

Reporting on the incident, President Jefferson in his first annual message to the Congress on December 8, 1801 said:

> "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstances of weight."

Following the Civil War, in a suit brought by the son of Robert E. Lee for the ejectment of U.S. agents from his family estate in Arlington, site of the National Cemetery, the Supreme Court restored the property which had been taken by "force and violence and detained by the strong hand" of the United States to the Lee family

observing the wrongful possessor, agent for the government which wrongfully seized the property, cannot say

> "Stop here: I hold by order of the President, and the progress of justice must be stayed...by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

United States v. Lee, 106 U.S. 196, 220-21 (1982).

The Court wrote in a case restoring property to the leading rebel military family in our bloodiest American war

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it."

Id. at 220.

In the famous Spanish-American War cases, The Paquete Habana and The Lola, 175 U.S. 677 (1900) the United States Supreme Court held that two Spanish flag fishing boats sailing out of Havana, seized by the

U.S. Navy during a declared war, were illegally taken under international law which governed. The Court after an exhaustive recitation of international authority held:

> "...it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war."

The Paquete Habana, supra, at 708.

The United States was ordered to give the proceeds of the sales of the vessels and cargo to the claimants and pay damages and costs.

During the Korean War, with hundreds of thousands of U.S. soldiers serving in Korea, the Supreme Court held the President had no power to seize U.S. steel mills he said were necessary for the war effort which were

threatened with labor strikes. Justice Black, writing for the Court, refused to sustain the President's order as an exercise of his military power as Commander in Chief of the Armed Forces. Youngstown Steel and Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

By its plain words, the Constitution extends the "judicial Power...to controversies to which the United States shall be a Party..." Article III, Section 2. In early cases, military officers acting on the order of the President were accountable in damages for their misdeeds. See, Little v. Barreme, supra; United States v. Peters, 9 U.S. 115 (1809); Meigs v. McLungs Lessee, 9 Cranch 11 (1815); See, Osborn v. Bank of the United States, 9 Wheat. 738 (1824).

In a famous case arising from a combat zone in the Province of Chihuahua, Mexico, during the Mexican American War, this

Court sustained a claim by a merchant whose property was seized and destroyed by Colonel David D. Mitchell. Chief Justice Taney, writing for the Court said:

> Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed.

Mitchell v. Harmony, 54 U.S. 115, at 137 (1851).

Indifference to the sovereign nature of a party was often expressed by Chief Justice Marshall and the Court in such cases as Cohens v. Virginia, 6 Wheat. 264 at 303 (1821):

> "...a case arising under the Constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to the case."

Scholars have observed that the doctrine of sovereign immunity "developed largely in dicta, without careful scrutiny

of its underpinnings." Hart and Wechsler, The Federal Court and the Federal System, Third Edition, the Foundation Press, 1988, p. 1109.

The United States first successfully invoked the doctrine of sovereign immunity more than fifty years after ratification of the Constitution. In both of the first two such cases, involving equity suits for injunctions to prevent the U.S. from collecting judgments it had obtained against plaintiffs in legal actions, the Court suggested the private plaintiffs could have raised the issues of liability in those legal actions. See, United States v. McLemore, 4 How. 286 (1846); Hill v. United States, 9 How. 386 (1850).

In the twentieth century, U.S. Courts have enlarged the application of sovereign immunity, often ignoring its lack of historical foundation, while ironically considering it an anachronism.

Even in cases where recovery has been denied on the facts presented, however, the Supreme Court has recognized a right of recovery for injuries from illegal military actions.

In Laird v. Tatum, 408 U.S. 1, at 15-16 (1972) Chief Justice Burger, writing for a five person majority in a case rejecting federal liability for surveillance of civilians during the Vietnam War, observed:

> Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

In Holtzman v. Schlesinger, 414 U.S. 1304, at 1309-10 (1973), Justice Marshall, on an application for a stay wrote:

> "...we have undoubted authority to judge the legality of executive

action..."

Even damage suits brought by military personnel against their superiors for injuries incident to their military service which necessarily concern questions of military discipline have won the support of four Justices where the conduct causing the injury, such as the surreptitious administration of LSD for testing, is unconscionable. See the dissenting opinion of Justice O'Connor who, after discussing the Nuremberg medical testing cases wrote,

> "...the very least that society can do is to see that the victims are compensated ... by the perpetrators ... I would permit James Stanley's Bivens action to go forward."

United States v. Stanley, 97 L.Ed.2d 550 at 569-70 (1987).

In addition to these authorities establishing liability where the executive acted illegally and in excess of its authority, Petitioner relied below on Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

The Courts never addressed the issue. The viability of plaintiffs' Bivens claims ought to be fully briefed by the parties, argued on the merits and decided by the Courts.

Here the acts ordered by the President were not acts the Constitution empowered him to order, were not authorized by any Congressional legislation, and violated criminal laws and civil rights of all jurisdictions involved.

The President in ordering the assassination attempt even violated his own order. Executive Order No. 12333, Sec. 2.11 provides,

> "2.11 Prohibition of Assassination. No Person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." 46 F.R. 59941 (December 4, 1981).

Sanchez-Espinosa v. Reagan, 770 F. 2d 202 (D.C. Cir. 1985) involved U.S. training and support of the Contras in Nicaragua who allegedly committed crimes against

plaintiffs. It is far removed from the facts of this case. It did not involve direct orders by the President to commit illegal acts. It did not involve the commission of criminal acts by U.S. personnel. The Congress gave some legislative approval, including appropriations. The specific conduct which caused the injuries were the acts of private individuals who acted independently of any government. In this case, U.S. military officers executed orders of the President in violation of his authority and the law of nations. See, Tel-Oren v. Libya Arab Republic, 726 F.2d 774, 791-96 (D.C. Cir. 1984) (Edwards, C.J. concurring).

Butz v. Economou, supra, held that in a suit for damages against the Secretary of Agriculture and others for alleged retaliation against plaintiff employees for their criticism of the Department, there is only qualified immunity even for

discretionary acts within the scope of the Secretary's authority against a claim of violation of constitutional rights. There plaintiffs had been afforded a chance to defend against the retaliation in administrative proceedings. Still their claims for damages could be prosecuted against government officials.

The Court reached the same conclusion where Governor Rhodes, commander in chief of Ohio, and others were sued for damages arising from rifle fire by the Ohio National Guard at Kent State University which killed four students and injured others while acting to maintain order. Scheuer v. Rhodes, 416 U.S. 232 (1974). See also Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973).

The most egregious ruling of the Court below is that "In the circumstances presented by this case, the Court concludes that each of the other named U.S. defendants

is similarly entitled to immunity from this suit, whether the immunity is classified as absolute or qualified, and whatever the origins of the rights plaintiffs claim may have been violated." A18. The source of immunity, its character, the rights that were violated are all unstated. The circumstances found by the Court as the basis for its ruling are undefined though on a motion to dismiss they must include the allegations in the complaint. The law is, however, clear that an official protected by qualified immunity is personally liable for unlawful acts unless the acts are objectively legally reasonable in the light of clearly established law. Anderson v. Creighton, 97 L.Ed.2d 523 (1987). Here it was clear the individual defendants knew their acts were crimes under U.S. military rules of engagement and international law for which they could be prosecuted and Mrs. Thatcher publicly stated they violated

international law. Under the circumstances there is no immunity.

In U.S. v. Nixon, 418 U.S. 683 (1974) a unanimous Supreme Court held the President was not immune from a subpoena for the famous White House Tapes in his possession in the Watergate scandal.

In Nixon v. Fitzgerald, 457 U.S. 731 (1982) the U.S. Supreme Court, by a 5 to 4 vote, in a case involving the employment rights of a federal management analyst held only that the President was entitled to absolute immunity from liability predicated on his official acts within the perimeter of his responsibility. Attempted assassination and intentional killing of civilians is not within the perimeter of the President's responsibility. Justice Blackmun observed in his dissent,

> "...the Court leaves unanswered the unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law." Id. at 797.

2. The United States expressly waived its immunity from liability for the acts alleged in the Federal Tort Claims Act.

The District Court held in a single sentence in footnote 4, A16, that the express waiver of the sovereign immunity of the United States in the Federal Tort Claims Act was inapplicable because this case falls within three of the FTCA's exceptions for acts involving the exercise of discretion, claims arising from combatant activities in time of war, and claims arising in a foreign country. This cursory treatment was inadequate and erroneous. It creates troublesome precedents for future cases considering these exceptions.

The discretionary function exception, 28 U.S.C. 2680(a), applies only to conduct that involves the permissible exercise of policy judgment. Conduct cannot be discretionary if it is prohibited by law. Berkovitz v. U.S., 100 L.Ed.2d 531 at 541, citing Westfall v. Erwin, 484 U.S. ____, 98

L.Ed.2d 619 (1988). The Court reiterated the principle, stated in United States v. Varig Airlines, 467 U.S. 797, 813 (1984), that it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. Berkovitz v. United States, supra, at 540.

A government official has no discretion to act beyond his authority. Defendants' policy judgments were unauthorized and therefore did not come within the FTCA's discretionary function exception; their conduct, though criminal, illegal and unauthorized, was nonetheless within the scope of their employment for purposes of the Act. Hatahley v. U.S., 351 U.S. 173, 180-81 (1956); Red Lake Band of Chippewa Indians v. U.S., 800 F.2d 1187, 1196, n.4 at 1197 (D.C. Cir. 1986); Birnbaum v. U.S., 588 F.2d 319, 329 (2d Cir. 1978); Glickman v. U.S., 626 F.Supp. 171, 175

(S.D.N.Y. 1985).

At the time of the clandestine military strike on Libya in April 1986 there was no war, declared or undeclared. The bombing was an illegal use of the military and naval forces of the United States during peacetime. To apply the combatant exception, 28 U.S.C. 2680(j), to such an attack would be to read the phrase "during time of war" out of the statute.

Vogelaar v. U.S., 665 F.Supp. 1295 (E.D. Mich. 1987) supports the inapplicability of the combatant exception in this case. That decision citing authority supporting a narrow interpretation of this exception, cut off any operation of the exception for acts or omissions in Vietnam as of the signing of the peace treaty ending the Vietnam War. It reasons that any injuries thereafter did not occur "during time of war."

For purposes of the foreign country

exception a claim arises where the act or omission complained of occurs, even though the act or omission had its "operative effect," i.e. the injury occurred, in a foreign country. Beattie v. U.S., 756 F.2d 91, 96 (D.C. Cir. 1984); Sami v. U.S., 617 F.2d 755, 761-63 (D.C. Cir. 1979); Glickman v. U.S., supra at 174 (S.D.N.Y. 1985).

FTCA claims for injuries in foreign countries resulting from actions of government officials in the United States have been characterized as "headquarters claims." See Beattie, 756 F.2d at 96-97, Vogelaar, supra, at 1300-02. The complaint alleges and describes wrongful conduct of defendants occurring in the District of Columbia, California, Virginia and elsewhere within and outside the United States, para. 27, A40, and that the decision to have U.S. aircraft bomb Libya was made by President Reagan in California, para. 26, A40.

As was stated in Sami in 1979, supra at

762, and appears equally valid today:

> "No case to our knowledge has held the United States exempt from liability for acts or omissions occurring here which have their operative effect in another country. Indeed, to the extent the decided cases address the issue at all, they have come to a contrary conclusion."

3. The United Kingdom and Prime Minister Margaret Thatcher are not protected by any doctrine of immunity.

The District Court held the Act of State doctrine compelled dismissal of the complaint as to the United Kingdom, A14. Finding the complaint charges "Britain's complicity in an illicit act of war committed by the United States", the District Court held such conduct constitutes "an archetypal act of state." A13. It cited two cases, Underhill v. Hernandez, 168 U.S. 250 (1897) and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), to support its action.

Since the denial of a rehearing in the Court of Appeals, this Court has made

important clarifications in the act of state doctrine in W.S. Kirkpatrick, Inc. v. Environmental Tectonics Corporation International, 58 U.S.L.W. 4140 (1990). Kirkpatrick confirms that the act of state doctrine is inapplicable here.

Kirkpatrick unanimously held:

> ...Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. at 4143.

The complaint in this case does not ask or require a court of the United States to declare invalid any official act by the United Kingdom taken within its own territory. At issue is not the validity of the United Kingdom's grant of permission to use its territory, but its complicity in the attack by the United States against Libya.

Both of the British defendants are charged in the complaint, with conspiring, aiding and abetting and acting in concert with their codefendants and others with respect to a range of actions in the United States and elsewhere culminating in the bombing of Libya. The district court is not required to address, or decide, and the outcome of the claim against the United Kingdom and Mrs. Thatcher does not rest on, a declaration or finding that any official act of the United Kingdom within its jurisdiction was invalid and thus ineffective as a rule of decision for the Courts of this country, any more than the claim in Kirkpatrick rested on the legality of the Nigerian contract. As petitioners had argued in their opposition below, "the foreseeable, actual and intended consequences of the actions occurred and were applicable in Libya and not the United Kingdom...the acts here resulted in

destruction of property in Libya and deaths and personal injuries there." Citing Restatement of Law Third: The Foreign Relations Law of the United States (1987). Cf. Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).

The acts of Mrs. Thatcher do not resemble in any way archetypal acts of state. These are usually a taking or expropriation by a foreign state of property within its own territories or other acts of a governmental character done by a foreign state within its own territory and applicable there. See Restatement, §443. It would totally distort the nature and purpose of the acts of Mrs. Thatcher to characterize them as being confined to the territory of the United Kingdom.

Further, there is no act of state immunity for the kind of violations of international law here presented. In Rose v. Himely, 8 U.S. (Cranch) 240 (1808), Chief

Justice Marshall held U.S. Courts are required to examine the validity of a foreign court's action under the law of nations, an issue not even raised in Underhill v. Hernandez, supra. See, Restatement of the Law, Third, The Foreign Relations Law of the United States (1987), §443, Comment c, p. 370:

> ...A claim arising out of an alleged violation of fundamental rights - for instance, a claim on behalf of a victim of torture or genocide - would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts. See §§701-703...

See also Liu v. The Republic of China, 892 F.2d 1419, 1431-34 (9th Cir. 1989); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1544-47 (N.D.Cal. 1987). For a recent review of the act of state doctrine, written before but acknowledging Kirkpatrick, supra, finding "...no issue is in more need of coherent analysis than the act of state doctrine...", see, Leigh, Sabbatino's

Silver Anniversary and the Restatement: No Cause for Celebration, 24 Int'l.Lawyer 1 (1990).

As Kirkpatrick points out, 58 U.S.L.W. 4143, even in cases where the act of state is technically available, the judiciary may consider whether it should nevertheless not be recognized. See also, Banco Nacional de Cuba v. Sabbatino, supra.

As to Mrs. Thatcher, who was head of government, (not head of state), after finding the Department of State had "made the requisite certification and determination to allow the immunity" for her, the District Court held it "must accept them as conclusive". It cited two admiralty cases involving in rem proceedings in U.S. courts against ships owned by foreign governments without more. Both cases pre date the Foreign Sovereign Immunities Act. Ex parte Republic of Peru, 318 U.S. 578, 589 (1943); Republic of Mexico

v. Hoffman, 324 U.S. 30 (1945).

There is no basis in law for a holding that the Department of State by its suggestion can confer immunity on Mrs. Thatcher precluding the courts of the United States from consideration of the immunity issue. Since the act of state doctrine and foreign sovereign immunity are inapplicable as a matter of law as a defense here for the United Kingdom the Department of State has no power to mandate immunity for the head of that government on the same claims. "The scope of [head of state] immunity is in an amorphous and undeveloped state... [S]ince there is no agreement on the degree of immunity that attaches to the status of head of state, there is no standard that can be viewed as customary international law.'" In re Doe, 860 F.2d 40, 44 (2d Cir. 1988). (Considering head of state immunity from prosecution of Ferdinand and Imelda Marcos.) It would be strange for an an agent of a

foreign government to have immunity for her acts when the government itself does not.

The federal executive branch cannot grant immunity which it does not have itself, to a foreign government or official which the Courts of the United States must accept for violations of international law, where as here the foreign official and her nation acted in concert with the United States. To give conclusive effect to a suggestion of immunity in this case would be an abdication of judicial responsibility.

Argentine Republic v. Amerada Hess, 488 U.S. ___ (1989), reversing the U.S. Court of Appeals, 830 F.2d 421 (2d Cir. 1987), was decided after the District Court ruled in this case. Its holding that the Foreign Sovereign Immunities Act is the exclusive measure of the liability of foreign governments in U.S. courts did not contemplate a case in which that foreign government acted in complicity with the

United States to commit international crimes of extraordinary dimension, as well as crimes under the laws of the United States.

The United States and its agents were the principal actors and defendants here. Their co-conspirators should also be accountable in the same lawsuit. Application of any doctrine of immunity to protect the United Kingdom from responsibility for such crimes when the United States has no such immunity itself, and both nations have acted in concert, is entirely unwarranted. It would place diplomatic amenities above international law, accountability for war crimes and the protection of human rights. It would empower a wrongdoer to absolve his accomplice. The rule in Amerada Hess is limited to cases in which the United States can lawfully confer immunity. Unquestioning judicial acceptance of immunity cannot be

compelled to cover crimes by government agents and protect accomplices.

Amerada Hess repeatedly recognizes that "applicable international agreements" and "international agreements to which the United States" was a party at the time the FSIA was passed provide an exception to the terms of that act. These international agreements are clear and important waivers of sovereign immunity on which petitioners relied. In view of United States participation in the United Nations, its ratification of the Hague and Geneva Conventions and the Nuremberg Charter, among others, it is clear that Congress did not intend in the FSIA to immunize governments from accountibility theretofore existing for international crimes, including war crimes. Consistent contruction of the application of Congressional legislation to pre-existing rights under treaties and international law require deference to those

authorities in the absence of the clearest expression to the contrary. See Murray v. The Charming Betsy, 6 U.S. 64 (2 Cranch) (1804); U.S. v. PLO, 695 F.Supp. 1456, 1464-65, 1468-71 (S.D.N.Y. 1988). Amerada Hess held the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention do not create exceptions to the FSIA on the facts of that case. It did not address liability created by the large body of international agreements relied on by petitioners. See Pp. 2-3, above. Nor is it clear that its holding would apply, for instance, had Argentina in peacetime torpedoed a passenger cruise ship for the purpose of killing one or more people on board at the request of the United States.

Amerada Hess holds that the Alien Tort Statute, which by its terms does not distinguish among classes of defendants, has the same effect after passage of the FSIA as before with respect to defendants other than

foreign states, 102 L.Ed.2d at 830-31. The FSIA is silent about agents of foreign governments, even heads of government. See, In re Doe, supra. Amerada Hess, therefore, provides no basis for the assertion of immunity in this case to claims under the Alien Tort Statute for any defendant other than the United Kingdom, including Mrs. Thatcher.

In Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822), a case involving governmental acts in violation of international law, this Court stated that even if a foreign sovereign, a King or Head of State, "comes personally within our limits, although he generally enjoys a personal immunity, he may become liable to judicial process, in the same way, and under the same circumstances, as the public ships of the nation." Id. at 353. To the same effect is 9 Op.Att'y Gen. 356, 362-63 (1859): "[a] sovereign who tramples upon

the public law of the world cannot excuse herself..." Many cases cite Santissima Trinidad for the proposition that there is no absolute immunity for foreign sovereigns. See Tucker v. Alexandroff, 183 U.S. 424, 457 (1902); Rex v. Cia De Vapores, S.A., 660 F.2d 61, 71 (3d Cir. 1981)(Sloviter J., dissenting); Irvin v. Quintanilla, 99 F.2d 936 (5th Cir. 1938); U.S. v. McLain, 331 Fed. 763, 766 (D.Md. 1887). Argentine Republic v. Amerada Hess recognizes the continuing viability of Santissima Trinidad. See 102 L.Ed.2d at 829-30.

4. International Law Precludes Any Defense of Immunity for the Acts Alleged in this Case.

The United States cannot sustain claims of sovereign immunity in U.S. courts for itself, its President, officials and officers, or confer immunity on the United Kingdom and its Prime Minister who acted in concert with the United States, against

claimed violations of international laws, including crimes against peace, crimes against humanity and war crimes. No Court of the United States has ever held there can be immunity against such claims. Nor has any case presented the issue to a federal court on such clear, uncontestable facts in such inescapable circumstances. If a government can declare itself, its agents, accomplices and co-conspirators, immune from all liability for violations of international law, including such crimes, then all hope for peace through international law is destroyed.

Customary international law is a part of the domestic law of the United States. Treaties and executive agreements are a part of the Supreme Law of the land. See, Article VI, Constitution of the United States; the Paquette Habana, supra; United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

International law operates directly under the Alien Tort Statute, and indirectly under 28 U.S.C. 1331 by virtue of Article VI of the Constitution and the incorporation of international law into federal common law. See also, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), on remand, 577 F.Supp. 860, 863 (E.D.N.Y. 1984); Forti v. Suarez-Mason, supra, 1543-44 (N.D.Cal. 1987).

In the midst of the Second World War, the Supreme Court addressed the justiciable nature of the laws and customs of warfare in United States courts:

> From the very beginning of its history this court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.

Ex Parte Quirin, 317 U.S. 1 (1942), at 27-28.

This Court held in In re Yamashita, 327 U.S. 1, 8 (1945) that Congress had adopted "the system of military common law applied

by military tribunals so far as it should be recognized applicable by the Courts, and is further defined and supplemented by the Hague Convention. . ." See, The Nuremberg Trial, 6 F.R.D. 69, 130 (1946).

Violations of international law and the law and customs of warfare have always been actionable in U.S. Courts. Little v. Barreme, supra, and the many cases cited above. Use of unauthorized, illegal military violence in peacetime is no less so.

The numerous important provisions of international law violated by the raid are set forth in paragraph 3 and elsewhere in the complaint. Their violations are demonstrated in over 120 pages of detailed analysis by affidavits from petitioners' experts filed with the District Court. Because the Court of Appeals decided petitioners' appeal on motions for summary disposition, over petitioners' opposition

and without the District Court record on appeal, these affidavits were not before the Court of Appeals.

The commission of international crimes and particularly those related to war and peace of the kinds here involved is the one absolutely essential exception to any power a nation may claim to assert sovereign immunity, head of state immunity, head of government immunity, immunity under the act of state doctrine, claims to diplomatic immunity, or similar efforts to interpose barriers to the enforcement of international law. There is no legislative act or history suggesting Congress ever intended to assert such immunity . International law is of concern to the entire international community and there exists univeral jurisdiction among nations for both civil and criminal sanctions against violators of international law. Mutuality among nations in the application of such principles is the

basis for the protection of individual rights under international law and peace through law. See, U.S. v. Verdugo Urquidez, supra, 58 U.S.L.W. at 4270. To the extent a nation can immunize international crimes, there is no international law.

The absence of state power to confer immunity has been particularly clear with respect to violations of the laws and customs of warfare and serious violations of general human rights law. See, e.g., M. McDougal & F. Feliciano, Law and Minimum World Public Order 701-03 (1961); Dinstein, International Criminal Law, 5 Israel Yrbk. Human Rts. 55, 56-58, 62-64, 69-70, 83, 85-86 (1975); Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 Mil.L.Rev. 99, 1202-22 (1972); Letter to Ed., J. Paust, 71 Am.J.Int'l.L. 508, 510-11 (1977); Paust, Draft Brief Concerning Claims of Foreign Sovereign Immunity and

Human Rights: Nonimmunity for Violations of International Law Under the FSIA, 8 Hous.J.Int'l.L. 49 (1985).

All international law of modern times has prohibited the assassination of foreign leaders and the intentional bombing of civilian populations. The Charter of the International Military Tribunal (The Nuremberg Charter) prescribes among the acts within its jurisdiction for which there was individual responsibility, crimes against peace, including waging war of aggression; war crimes, including such violations of the laws or customs of war as murder of civilians and wanton destruction of cities; crimes against humanity, including murder and other inhumane acts against any civilian. Article 7 of the Charter provides

> The official position of defendants, whether as Head of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Damages have always been recoverable

for Presidential and other executive conduct which violates internaticnal law as has been shown and is especially clear where the President acts without Congressional authority, or acquiescence. See, Glennon, Raising The Paquette Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 N.W.L.Rev. 321 (1985).

The military officers involved in planning and executing this raid knew that assassination, intentional killing of civilians and surprise attacks, were criminal acts in violation of not only international law, but their own service manuals controlling their conduct in the course of armed conflict, for which they are individually responsible even if acting on orders. This was fully presented by petitioners in their submissions to the District Court but of necessity only briefly presented by petitioners in the

Court of Appeals in the limited submission permitted in opposition to motions for summary disposition of the appeal.

The appropriateness of damages as a remedy for egregious violations of international law was forcefully stated by the District Court in Filartiga, on remand, supra, 577 F.Supp. 860, 863 (E.D.N.Y. 1984).

5. Dismissal before answer, summary disposition on appeal, Rule 11, Fed R. Civ. sanctions and Rule 38 Fed.R.App.P. attorneys fees and costs are inappropriate on the facts of this case.

This case is of exceptional importance because it is the first judicial holding by any court of the United States that the President can order an assassination and the killing of civilians in foreign cities during peacetime by illegal surprise military bombardment and persons killed or injured as a result have no remedy in U.S. Courts. Dismissal before answer by the District Court with conclusory rulings and

cryptic citation of authority, or none, to the many thoroughly briefed and supported legal theories presented by petitioner, followed on appeal by summary disposition on motion with limited written submissions, no oral argument, and no opinion supporting affirmance of dismissal requires reversal. Reversal of the District Court, imposition of sanctions with a brief opinion, and imposition of attorneys fees and costs on appeal in a case without legal precedent and of historic importance also requires reversal.

Questions of law raised by the complaint are complex, obscure, developing and unprecedented. Since the District Court or the Court of Appeals acted, this Court has decided among other relevant cases, Argentine Republic v. Amerada Hess, (1989), supra; W.S. Kirkpatrick, Inc. v. Environmental Tectonics Corporation International, (1990), supra; and United

States v. Verduzo-Urquidez, (1990), supra.

Counsel, bound to zealously assert petitioners' rights, cannot consistent with that obligation, respond in the same action in self defense to charges that sanctions should be imposed on counsel because petitioners' claims are frivolous. No submission on the sanctions issues, oral or written, has been made by counsel below and none will be made here, except to say counsel have never filed an action they believed to be more important to constitutional government and the rule of law, and believe these claims are right as a matter of law.

The reasons for the cursory disposition below may be found in both Courts use of the word "audacious." Webster's Third New International Dictionary defines "audacious 2a: manifesting defiance of or contempt for the restrictions of law, religion, social codes, or tradition: insolent." The courts

were offended by the claims. Rules 11 and 38 were used as a latter day penalty for *lese majeste.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ramsey Clark
Counsel of Record
Lawrence W. Schilling
Attorneys for
Petitioners
36 East 12th Street
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212-475-3232

March 22, 1990

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5051 September Term, 1988

Farag M. Mohammed Saltany, et al.,

Appellants

v.

Ronald W. Reagan, President of U.S., et al.

And consolidated cases

BEFORE: Buckley, D.H. Ginsburg and
Sentelle, Circuit Judges

O R D E R

Upon consideration of the United States' motion for summary affirmance, the United Kingdom's and Prime Minister Thatcher's motion for summary affirmance in part and for summary reversal in part. and an award of damages and costs, and the opposition and replies thereto, it is

ORDERED that the district court's memorandum and order filed December 23, 1988 granting defendants' motions to

dismiss, be summarily affirmed substantially for the reasons stated therein. It is

FURTHER ORDERED that the motion for summary reversal in part, and an award of damages and costs be granted for the reasons stated in the accompanying per curiam opinion.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

[Stamped:]
FILED SEP 29, 1989
Constance L. Dupre
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided September 29, 1989

Nos. 89-5051, 89-5052 & 89-5053

FARAG M. MOHAMMED SALTANY, *et al.*, APPELLANTS

MUNIEM MOHAMED IBRAHEIM AL-MSHIRGI, *et al.*

v.

RONALD W. REAGAN, PRESIDENT OF U.S., *et al.*

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 88-00981)

On Motion for Summary Reversal

Mark R. Joelson, *Joseph P. Griffin*, and *Mark N. Bravin* were on the pleadings for Thatcher, *et al.*, appel-

lants in No. 89-5053 and appellees in Nos. 89-5051 & 89-5052.

Ramsey Clark and *Lawrence W. Schilling* were on the pleadings for Saltany, *et al.*, appellants in No. 89-5051 and appellees in Nos. 89-5052 & 89-5053.

Larry L. Gregg and *Barbara L. Herwig* were on the pleadings for Reagan, *et al.*, appellants in No. 89-5052 and appellees in Nos. 89-5051 & 89-5053.

Before: BUCKLEY, D.H. GINSBURG, and SENTELLE, *Circuit Judges.*

Opinion PER CURIAM.

PER CURIAM: On April 13, 1988, fifty-five Libyan citizens and residents filed suit in the district court seeking damages for injuries, death, and property loss sustained in the 1986 United States air strike on Libya. Substantial damages were sought from the United States, President Reagan, senior civilian and military officials, and from the United Kingdom and Prime Minister Thatcher as well. Plaintiffs sought to hold the British defendants liable on the basis that the Prime Minister gave the United States permission to use British air bases in the air strike. Plaintiffs asserted claims under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, the Foreign Claims Act, 10 U.S.C. § 2734, the Alien Tort Claims Act, 28 U.S.C. § 1350, the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, *et seq.*, and various constitutional and common law theories, including the "tort law of Libya."

Upon motions, the district court dismissed plaintiffs' claims as to all defendants. *See Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988). Plaintiffs appealed and defendants have moved this court for summary affirmance. By separate order this date, we affirm the decision dismissing plaintiffs' case.

Both the United States and the British defendants also moved the district court for sanctions pursuant to Federal Rule of Civil Procedure 11, on the grounds that plaintiffs abused the judicial process and needlessly imposed upon defendants the cost of defending against an action not supported by existing law or by any good faith argument for the extension, modification, or reversal of existing law. The district court found that plaintiffs' counsel "surely knew" that the case "offered no hope whatsoever of success," but it declined to impose sanctions in the interest of keeping the courthouse door open as a forum for suits "brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement." *Id.* at 322.

The United Kingdom has cross-appealed from, and seeks summary reversal of, the decision denying sanctions. Additionally, the United Kingdom seeks attorneys' fees and costs, pursuant to both Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1927, for the costs of defending against a frivolous appeal. For the reasons stated below, we reverse and remand the district court decision with regard to the Rule 11 sanction, and grant the United Kingdom's motion for attorneys' fees and costs on appeal pursuant to Rule 38.

I. Federal Rule of Civil Procedure 11

The United Kingdom asserts that the district court erred in denying its Rule 11 motion for attorneys' fees and costs, relying upon the well established principle that the court must impose a sanction "once it has found a violation of the rule." *Weil v. Markowitz*, 829 F.2d 166, 171 (D.C. Cir. 1987) (footnote omitted); *Westmoreland v. CBS*, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985). Thus, the question is whether the district court found, or should have found, that plaintiffs violated Rule 11. If so, then a sanction must be imposed.

Here, the district court observed that plaintiffs, citizens or residents of Libya, could not be "presumed to be familiar with the rules of law of the United States." *Saltany*, 702 F. Supp. at 322. The court noted, however, that "[i]t is otherwise . . . with their counsel. The case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it." *Id.*

The court thus found, in substance if not in terms, that plaintiffs' counsel had violated Rule 11; yet the court did not impose a sanction. Instead, the court went on to observe that because the "injuries for which the suit is brought are not insubstantial," the case is not "frivolous so much as it is audacious." *Id.* The seriousness of the injury, however, has no bearing upon whether a complaint is properly grounded in law and fact. We may agree with the district court that the suit is audacious—that is not sanctionable in itself—but, we do not see how filing a complaint that "plaintiffs' attorneys surely knew" had "no hope whatsoever of success" can be anything but a violation of Rule 11.

Nonetheless, surmising that the suit was brought as a public statement of protest, the district court opined that courts can "serve in some respects as a forum for making such statements, and should continue to do so." *Id.* (citing *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring in dismissal of appeal)). We do not conceive it a proper function of a federal court to serve as a forum for "protests," to the detriment of parties with serious disputes waiting to be heard. In any event, reliance upon *Talamini* was inappropriate. That opinion, representing the views of Justice Stevens and three other justices, argued in opposition to awarding sanctions against an attorney who had pursued an unmeritorious application for review in an otherwise unremarkable unfair trade practices action. It in no way speaks to the use of the courts as any sort of political or protest forum. Whether punitive sanctions

should be imposed for invoking the judicial process is properly fit into the equation when considering whether a Rule 11 violation has occurred. Here, the district court had already determined in effect that a violation had occurred. Therefore, we grant the United Kingdom's motion for summary reversal and remand the matter to the district court for imposition of an appropriate sanction.

II. Federal Rule of Appellate Procedure 38

The United Kingdom (with the support of the United States) seeks to recover the attorneys' fees and costs it incurred by reason of plaintiffs' pursuit of a frivolous appeal. We grant attorneys' fees and costs under Rule 38, and thus do not consider the alternate claim under 28 U.S.C. § 1927.

The basis for the United Kingdom's request is that the Supreme Court's decision in *Argentine Republic v. Amerada Hess Corp.*, 109 S. Ct. 683 (1989), which was issued about a month after the decision of the district court, utterly foreclosed plaintiffs' argument that the United Kingdom is subject to the jurisdiction of the courts of the United States. *Cf. Saltany*, 702 F. Supp. at 320-21 (dismissing claims against Prime Minister Thatcher on grounds of immunity, (citing *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943)) and against the United Kingdom under the "act of state" doctrine).

In *Amerada Hess*, the Court ruled unanimously and unequivocally that the Foreign Sovereign Immunities Act ("FSIA") provides the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Amerada Hess*, 109 S. Ct. at 688. Furthermore, the Court held that a foreign state's use of military force allegedly in violation of international law fell outside any of the exceptions to sovereign immunity provided by the FSIA. *Id.* at 690-92; *see also Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 n.1 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring) (suit against the Government

of Libya seeking damages for a terrorist attack in Israel was barred because of the exclusivity of the jurisdictional grant in the FSIA), *cert. denied*, 470 U.S. 1003 (1985). Under these holdings, the present appeal was clearly doomed.

Unyielding to the holdings in *Amerada Hess*, however, plaintiffs suggest that the FSIA may authorize this suit because the statute provides that the immunity of a foreign state from the jurisdiction of the courts of the United States is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]." 28 U.S.C. § 1604. In *Amerada Hess*, however, the Court examined this language and found that it applies only "when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA. . . ." *Amerada Hess*, 109 S. Ct. at 692 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6616; S. Rep. No. 1310, 94th Cong., 2d Sess. 17 (1976)).

On appeal, plaintiffs fail to identify any international agreement that "expressly conflicts" with the FSIA, and thus fail to establish any basis for jurisdiction in the courts of the United States. Consequently, we find that *Amerada Hess* clearly bars plaintiffs' claim against the United Kingdom, and that so much was apparent to counsel for plaintiffs before they imposed upon the United Kingdom the burden of this appeal. Accordingly, we grant the United Kingdom's motion for attorneys' fees and costs to be assessed against counsel.

The United Kingdom is directed to submit a statement of fees and costs; counsel for plaintiffs shall respond within fourteen days (14) of the date of their receipt of that accounting.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARAG M. MOHAMMED SALTANY, et al., Plaintiff, v. RONALD M. REAGAN, et al., Defendants	)	Civil Action No. 88-0981 [Stamped:] FILED DEC 23 1988

MEMORANDUM AND ORDER

This is an action to recover damages for death, personal injury, and the destruction of property occurring in the course of air strikes by U.S. military forces on targets in the nation of Libya in April, 1986. [1]

Plaintiffs allege themselves to be 55 civilians, all residents of Libya, whose

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[1] On the evening of April 14, 1986, on the order of the President of the United States, U.S. Air Force and U.S. Navy aircraft from bases in the United Kingdom and carriers of the U.S. Sixth Fleet in the Mediterranean Sea, respectively, executed bombing raids in the vicinity of Tripoli and Benghazi, Libya. The President acted, pursuant to Article 51 of the United Nations Charter, to protect U.S. lives and property against acts of terrorism determined by the U.S. government to have been instigated by the Libyan government.

decedents were killed, who suffered personal injuries, or whose property was damaged or destroyed in the attacks. Defendants are the President of the United States, various civilian and military officials of the U.S. government, Prime Minister Margaret Thatcher of the United Kingdom, and the United States and the United Kingdom themselves. In substance, the complaint alleges that all defendants conspired, acted in concert with, and aided and abetted one another in causing or permitting the attacks to be made, with a purpose to assassinate the Libyan head of state, and/or to "terrorize" the civilian population of Libya to the point of revolt against the government. The defendants, thus, are alleged to have violated the criminal and civil laws of several U.S. states, of the United States, certain treaties, and rules of international law.

Jurisdiction is said to be predicated upon various provisions of Title 28 of the

U.S. Code, specifically, sections 1331 (federal question); 1346(b) (the Federal Tort Claims Act); Title 18, section 1964 (the Racketeer Influenced and Corrupt Organization Act ("RICO")) is also said to confer jurisdiction.

All defendants have moved to dismiss the complaint, and for an award of sanctions. [2]

I.

The British defendants, the United Kingdom and Prime Minister Thatcher, are sought to be held liable because the British government gave permission for U.S. Air

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[2]The Court will assume, for purposes of the motions, that it is bound by the rule that all of the well-pleaded factual allegations of the complaint must be taken as true, Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977); that plaintiffs are entitled to all favorable inferences which may be drawn therefrom, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); and that the complaint may not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Force planes based in Great Britain to depart from and return to their air bases to participate in the mission.

Pursuant to 28 U.S.C. § 517 the United States has suggested to the Court the immunity from its jurisdiction of Prime Minister Thatcher as the sitting head of government of a friendly foreign state. The Department of State has made the requisite certification and determination to allow the immunity. The Court must accept them as conclusive. Ex Parte Republic of Peru, 318 U.S. 578, 589 (1943); see Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945). The complaint will be dismissed as to the defendant Thatcher.

With respect to the claims made against the United Kingdom itself, the act of state doctrine compels a dismissal of the complaint. Underhill v. Hernandez, 168 U.S. 250, 252 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). What is

charged is, quite simply, Britain's complicity in an illicit act of war committed by the United States. By any definition that description of the United Kingdom's allegedly wrongful conduct constitutes an archetypal act of state. Permission given by the head of government of one sovereign nation, speaking from its seat of government, to allow its territory to be utilized by an ally, at the ally's express request, to mount a military operation against a third power could not possibly be otherwise characterized. The Court concludes that the doctrine stands as an absolute bar to action against the United Kingdom, and it therefore becomes unnecessary to consider the several other

jurisdictional objections it has advanced in support of its motion to dismiss. [3]

II.

The United States defendants also contend that this Court is without jurisdiction to entertain the claims against them, the issues presented being both non-jusiticiable "political questions" entrusted by the Constitution to the other branches of government, and the several defendants entitled to immunities which render them unamenable to such a civil suit for damages. The Court agrees that all U.S. defendants are immune from this suit and does not,

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[3]The Court notes, however, that the United Kingdom has also asserted its sovereign immunity as a bar to the action. A foreign sovereign's immunity as a defense to suit in courts of the United States is now governed by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-1611, see Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), and appears to be a viable defense for the United Kingdom to claims such as are asserted here. See 28 U.S.C. § 1604, 1605.

therefore, reach the "political questions" issue.

The United States itself, as a sovereign, is immune from suit except to the extent it has waived its immunity, and a waiver of its sovereign immunity must be unequivocally expressed and never implied. United States v. Mitchell, 445 U.S. 535, 538 (1980). None of the statutory provisions relied upon by plaintiffs to maintain this action against the United States -- the Federal Tort Claims Act (28 U.S.C. § 2671 et seq.), the Alien Tort Claims Act (28 U.S.C. § 1350), the Foreign Claims act (10 U.S.C. § 2734), and RICO (18 U.S.C. § 1964) -- purport to waive the sovereign immunity of the United States with respect to claims

such as those made here. [4] The complaint will be dismissed as to the United States.

The military units were ordered into action by President Reagan in his capacity as commander-in-chief of the armed forces

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[4]The Federal Tort Claims Act expressly preserves the sovereign immunity of the United States for acts of its officials that involve the exercise of discretion, arise from combatant activities in time of war, or arise in a foreign country. 28 U.S.C. § 2680 (a)(j) and (k).

The Alien Tort Claims Act, which confers jurisdiction upon U.S. district courts to hear tort claims by aliens for alleged violations of U.S. treaties and the law of nations, is not itself a waiver of sovereign immunity, at least not that of the United States. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985). (But cf. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 4212 (2nd Cir. 1987), cert. granted, 56 U.S.L.W. 3718 (U.S. April 18, 1988)).

The Foreign Claims Act, allowing administrative claims to be made to the U.S. government for injury to persons or property abroad caused by its armed forces other than in combat, not only fails to contain an express waiver of sovereign immunity, but also contemplates no judicial review of the denial of a claim. See Broadnax v. United States Army, 710 F.2d 865 (D.C. Cir. 1983); 10 U.S.C. § 2735.

RICO merely empowers U.S. district courts to award civil remedies to persons injured by a "pattern of racketeering activity."

of the United States under Article II, section 2, of the Constitution. In so doing he acted with absolute immunity from liability in private civil suits for damages. Nixon v. Fitzgerald, 457 U.S. 731 (1982). The complaint must be dismissed as to the defendant Reagan.

All other named defendants are civilian or military officials of the United States government who are alleged to have planned and/or executed the air strikes ordered by the President. That they did so in their official capacities, and none other, is manifest, and plaintiffs do not allege otherwise. The avowed objective of the operation, irrespective of motive, was to inflict injury upon the Libyan targets which would be "tortious" were it to be judged by any civil law standards. The mission also called upon each participant of every rank to exercise discretion in a myriad of contexts of utmost complexity and gravity,

not to mention danger. And each acted, as duty required, in accordance with the orders of the commander-in-chief or a superior officer. In the circumstances presented by this case, the Court concludes that each of the other named U.S. defendants is similarly entitled to immunity from this suit, whether the immunity is classified as absolute or qualified, and whatever the origins of the rights plaintiffs claim may have been violated. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). The complaint will be dismissed as to each of them.

III.

The plaintiffs, purportedly citizens or residents of Libya, cannot be presumed to be familiar with the rules of law of the United States. It is otherwise, however, with their counsel. The case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it.

The injuries for which suit is brought are not insubstantial. It cannot, therefore, be said that the case is frivolous so much as it is audacious. The Court surmises it was brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement. The courts of the United States, however, serve in some respects as a forum for making such statements, and should continue to do so. As Justice Stevens said, as the Supreme Court dismissed, but declined to impose sanctions for, a meritless appeal:

> Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of

> the right to seek a peaceful redress of grievances through judicial means.

Talamani v. Allstate Insurance Co., 470 U.S. 1067, 1070-71 (1985). For essentially those reasons, therefore, the Court will deny defendants' applications for an award of sanctions.

It is, this 23rd day of December, 1988,

ORDERED, that the complaint is dismissed with prejudice as to all defendants; and it is

FURTHER ORDERED, that defendants' application for an award of sanctions is denied.

THOMAS PENFIELD JACKSON

U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5051 September Term, 1989

Farag M. Mohammed Saltany, et al.,

Appellant

v.

Ronald W. Reagan, President of U.S. et al.

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and Consolidated Case No. 89-5053

BEFORE: Buckley, D.H. Ginsburg and
Sentelle, Circuit Judges

[Stamped:]
FILED DEC 22 1989
Constance L. Dupre
CLERK

O R D E R

Upon consideration of the Petition for Rehearing of Appellants in Case No. 89-5051 it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK
BY: s/Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5051 September Term, 1989

Farag M. Mohammed Saltany, et al.,

Appellant

v.

Ronald W. Reagan, President of U.S. et al.

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and Consolidated Case No. 89-5053

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginbsurg and Sentelle, Circuit Judges

[Stamped:]
FILED DEC 22 1989
Constance L. Dupre
CLERK

O R D E R

The Suggestion for Rehearing En Banc of appellants in No. 89-5051 has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK
BY: s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald and Circuit Judges Mikva and Ruth B. Ginsburg would grant the suggestion in part, limited to the issue of sanctions.

COMPLAINT CIVIL ACTION NO. 88-0981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARAG M. MOHAMMED SALTANY, as personal representative of KHLOUD HASAN AL-ORAIBI, deceased and HASAN MOHAMED AL-ORAIBI, deceased; MOHAMMED A. TARHONY, as personal representative of HALIMA MOHAMED ABDUL QADIR, deceased; ABDOLHAMED ALI ALMESMARY, as pesonal representative of MOHAMED ALI AL-MISMARI, deceased; MASSUD A. ABDOLMOLLA, as personal representative of SALEH ABDUL KARIM ABDUL MAULA, deceased, SALLAH M. MOHAMMED, as personal representative of ABDUL QADIR SALEH MOHAMED AL-MARTOUZ, deceased; ABDALLA ALI EL YAZBI, as personal representative of MOHAMMAD YOUSSEF ALYAZGY, deceased, RASHAA MOUNIR SHARMEETT, deceased, KHADIJA SOLIMAN PASHA AGHA, deceased, YOUSSSEF ALY ALYAZGY, deceased and KHADIFA ALY ALYAZGY, deceased; B.F. AL-GHUSSEIN, as personal representative of RAFAT BASSAM AL-GHUSSEIN, deceased; ALI MILAD TWER, as personal representative of NAJIA MOHAMED ALTHOIR, deceased; ABDULMAGID IBRAHIM AL-MISHERGHI, as personal representative of MOHAMED IBRAHIEM AL-MSHIRGI, deceased; HANIYA M. HEGAB, as personal representative of MAHFOUD AL-SHEIK AL-MISURATI, deceased; NASR ALI MASOUD; BELGASIM ABRIEK ALI IBRAHM; SALEM MOHAMED ABDULA KNUBER ALI; KHALID MOHAMMAD SADEK AL-ZKAR; BASSAM FAWZI TAWFIC AL-GHUSSEN; SAID A.S. HITACH; MANSOUR SLIEH SLAMA; SALEM OMAR SALEM HDAIDAN; AMBURKA SALIM FARAHAT; NAJIA MOHAMED YAHIA; FAUZIA MILAD ALI ALTHOIR; HANIYAAH MOHAMMAD HAJAAB; MOUMAN MAHFOUD EL-SHEIK; NAJID MAHFOUD EL-SHEIK; FATIMA MAHFOUD AL-SHEIK; AHLAM MOHAMAD HEGAB; ABO-EGELA MOHAMMAD GRANA; FATMA MOHAMMED BACKUSH; ASMAA ABOEGELA GRANA; NAIMA HUSSEIN ABOZODA; NAIMA ABOEGELE GRANA; ABBULNASSER

ABO-EGELA MOHAMMAD GRANA; ;MOHAMMED ABOEGELA M. GRANA; ABU-ZIED OMAR DOORDA; AHMED ABU-ZIED OMAR DOORDA; MOURAD MOHAMED IBRAHIEM AL-MSHIRGI; MUNIEM MOHAMED IBRAHIEM AL-MSHIRGI; AWAISHA ALTAHIER IBRAHIEM BAKIER; MAHAA MOHAMED IBRAHIEM AL-MSHIRGI; MOHAMMAD SALEH ALI AL-GANZOURI; BREKA MABROKA SALEH AL-GANZOURI; MABROKA AHMAD ABOU-ESSBA; OUSSAMAH F.E. AL-SHRIF; ALI HIEDER IBREHIEM ALTHONALI; FATMA MOHAMMAD AL-SABLI; HALIMA ABD ELGAMI AL-KESHIK; MOHARRAM MOHAMED ALTHONALI; ALI MASOUD BEN ALI; and IZZEDDIN ALI MASOUD;

Plaintiffs,

Plaintiffs are all residents of the nation of Libya. Their address in the United States is:
c/o Ramsey Clark
36 East 12th Street
New York, N.Y. 10003

-v-

Ronald W. Reagan, President of the United States; Margaret Thatcher, Prime Minister of the United Kingdom; Caspar W. Weinberger; Admiral William J. Crowe, Jr., USN; Legal representative of the Estate of William J. Casey, deceased; General Bernard W. Rogers; Admiral Frank B. Kelso, Jr.; General Charles A. Gabriel; John Doe and Ruth Roe, et. al.; the United Kingdom; and the United States of America,

Defendants.

COMPLAINT FOR DAMAGES FOR VIOLATIONS OF THE INTERNATIONAL LAWS, THE CONSTITUTION, LAWS AND TREATIES OF THE UNITED STATES, THE LAWS OF LIBYA, THE DISTRICT OF COLUMBIA, VIRGINIA AND OTHER STATES UNDER THE ALIEN TORT

STATUTE, FEDERAL TORT CLAIMS ACT, FOREIGN CLAIMS ACT AND RICO

Plaintiffs, by their attorneys, for their complaint herein, respectfully allege as follows:

1. This is an action by or on behalf of 55 men, women, and children, all civilians, who were killed or injured in the U.S. bombing of Libya on April 14-15, 1986. Plaintiffs seek to recover damages for death, personal injury and the destruction of property. The action is against the United States of America, the United Kingdom, President Ronald W. Reagan, Prime Minister Margaret Thatcher and other present and former civilian and military officials and officers of the United States. The actions of the defendants leading to the bombing of Libya by aircraft of the United States Air Force and Navy violated the law of nations, international laws, maritime law, the Constitution, laws and treaties of

the United States, and the laws of Libya, the District of Columbia, California, Virginia and other states and were tortious. Plaintiffs' claims are being asserted under the Alien Tort Statute and the Federal Tort Claims Act, among other laws. Plaintiffs are all aliens and residents of Libya although some are absent from Libya from time to time for medical or other reasons.

2. This court has jurisdiction of this action under 28 U.S.C. 1331, 1346(b), 1350 and 1361, and 18 U.S.C. 1964, and principles of pendent jurisdiction.

3. Defendants are guilty of conduct constituting clear violations of settled principles of international law prohibiting the use of force by a state against the territorial integrity or political independence of another state, requiring settlement of international disputes by peaceful means, prohibiting armed attacks by a state against civilians, and prohibiting

crimes against heads of state and other internationally protected persons. These principles are established by the United Nations Charter, U.N. General Assembly resolution 2625 (24 October 1970), "Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations," the Universal Declaration of Human Rights, the international law of armed conflict, the Charter of the International Military Tribunal (Nuremberg Charter), the General Assembly Resolution adopting the Nuremberg Charter Principles, the Geneva Convention for the Protection of Civilians (1949), the Annexed Regulations to Hague Convention No. IV of 1907, Hague Convention No. IX of 1907 concerning Bombardment by Naval Forces in Time of War, The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (New York

1973), and other agreements, resolutions, treaties, declarations, documents and practices constituting the customary international law of human rights and the law of nations. Neither the United States nor the United Kingdom can invoke sovereign immunity under domestic law as a bar to the jurisdiction of this Court or as a defense on the merits.

4. This action arises under the Constitution, laws and treaties of the United States, including without limitation, the treaties of the United States set forth in the preceding paragraph; U.S. Const. Art. II, Sec. 3, commanding the President and other officials to take care that laws be faithfully executed, U.S. Const., Art. I, Sec. 8, conferring exclusive power on Congress to declare war, clause 11, and to define and punish offenses against the Law of Nations, clause 10; the criminal laws of the United States, including among others,

18 U.S.C. 956, 960 and 371, and the criminal laws of the District of Columbia, Virginia, California and other States; Executive Order No. 12333, promulgated by President Reagan, prohibiting U.S. employees from engaging in, or conspiring to engage in, assassination; directives of the Secretary of Defense and the Judge Advocates General of the Air Force and Navy, giving effect to the international prohibitions against armed attacks directed at civilans, e.g. the U.S. Air Force Manual, International Law -- The Conduct of Armed Conflict and Air Operations (AF 110-31, 19 Nov. 1976), para. 5-3; The Commander's Handbook on the Law of Naval Operations (Naval Warfare Publication 9, 1987) Chap. 8 and provisions of the Code of Military Justice which make clear that the only military orders which must be obeyed are orders which are lawful, see e.g. 10 U.S.C. 892, providing punishment for failure "to obey any lawful general order or

regulation..." and that obedience to an order to commit a criminal or unlawful act is no defense.

5. Written claims by or on behalf of the plaintiffs in this action for deaths, injuries and damage incurred in the U.S. bombing of Libya described in this complaint were duly filed in April, May and June, 1987 with the Office of the White House and the United States Department of Defense in accordance with the prescribed procedures for the filing of claims under the Federal Tort Claims Act. The Department of Defense referred the claims that were filed with it to the Department of the Air Force. The Air Force considered the claims under the Foreign Claims Act, 10 U.S.C. 2734, and denied them as such by letter dated October 16, 1987. To date, no denial or notice of any other action taken on the claims filed with the Office of the White House has been communicated to plaintiffs.

6. Plaintiffs are the personal representatives of 15 persons who were killed in the U.S. bombing of Libya described in this complaint, and 40 survivors of the bombing who sustained serious personal injuries and property loss. Plaintiff FARAG M. MOHAMMED SALTANY is the personal representative of HASAN MOHAMED AL-ORAIBI, 38, who was killed by shrapnel to his skull, and of his daughter KHLOUD HASAN AL-ORAIBI, an infant 3 months of age, who was killed by shrapnel penetrating her chest as she slept, both in their home in a residential area of Benghazi at about 2:00 a.m. on April 15, 1986, Libyan time. The other plaintiffs who are personal representatives of persons killed by the bombing are MOHAMMED A. TARHONY, representative of HALIMA MOHAMED ABDUL QADIR, deceased; ABDOLHAMED ALI ALMESMARY, representative of MOHAMED ALI AL-MISMARI,

deceased; MASSUD A. ABDOLMOLLA representative of SALEH ABDUL KARIM ABDUL MAULA, deceased; SALLAH M. MOHAMMED representative of ABDUL QADIR SALEH MOHAMED AL-MARTOUZ, deceased; ALI ABDALLA ALI EL YAZBI representative of MOHAMMAD YOSSSEF ALYAZGY, deceased, RASHAA MOUNIR SHARMEETT, deceased, KHADIJA SOLIMAN PASHA AGHA, deceased, YOUSSEF ALY ALYAZGY, deceased, and KHADIFA ALY ALYAZGY, deceased; B.F. AL-GHUSSEIN representative of RAFAT BASSAM AL-GHUSSEIN, deceased; ALI MILAD TWER representative of RAFAT BASSAM ALTHOIR, deceased; HANIYA M. HEGAB representative of MAHFOUD AL-SHEIKH AL-MISURATI, deceased, and ABUDLMAGID IBRAHIM AL-MISHERGHI representative of MOHAMED IBRAHIEM AL-MSHIRGI, deceased.

7. The remaining 40 plaintiffs are persons who survived the bombing and are suing for serious personal injuries and property damage sustained in the bombing.

They are SALEM MOHAMED ABDULA KNUBER ALI, NASR ALI MASOUD, BELGASIM ABRIEK ALI IBRAHM, KHALID MOHAMMAD SADEK AL-ZKAR, BASSAN FAWZI TAWFIC AL-GHUSSEN, SAID A.S. HITACH, MANSOUR SLIEH SLAMA, SALEM OMAR SLEM HDAIDAN, AMBURKA SALIM FARAHAT, NAJIA MOHAMED YAHIA, FAUZIA MILAD ALI ALTHOIR, HANIYAAH MOHAMMAD HAJAAB, MOUMAN MAHFOUD EL-SHEIK, NAJIB MAHFOUD EL-SHEIK, FATIMA MAHFOUD AL-SHEIK, AHLAM MOHAMAD HEGAB, ABO-EGELA MOHAMMAD GRANA, FATMA MOHAMMED BACKUSH, ASMAA ABOEGELA GRANA, NAIMA HUSSEIN ABO-ZODA, NAIMA ABOEGELE GRANA, ABDULKARIM ABO-EGELA MOHAMMAD GRANA, ABDULNASSER ABO-EGELA MOHAMMAD GRANA, MOHAMMED ABEGELA M. GRANA, ABU-ZIED OMAR DOORDA, AHMED ABU-ZIED OMAR DOORDA, MOURAD MOHAMED IBRAHIEM AL-MSHIRGI, MUNIEM MOHAMED IBRAHIEM AL-MSHIRGI, AWAISHA ALTAHIER IBRAHIEM BAKIER, MAHAA MOHAMED IBRAHIEM AL-MSHIRGI, MOHAMMAD SALEH ALI AL-GANZOURI, BREKA MABROKA SALEH AL-GANZOURI, MABROKA AHMAD ABOU-ESSBA, OUSSAMAH F.E. AL-

SHRIF, ALI HIEDER IBREHIEM ALTHONALI, FATMA MOHAMADA AL-SABLI, HALIMA ABD ELGAMI AL-KESHIK, MOHARRAM MOHAMED ALTHONALI, ALI MASOUD BEN ALI and IZZEDDIN ALI MASOUD.

8. Defendants United States of America and the United Kingdom are being sued under 28 U.S.C. 1350 for their clear violations of settled principles of international law for which they are not entitled to invoke any immunity as sovereigns. In addition, the United States has waived its sovereign immunity with respect to the claims set forth in this complaint under the Federal Tort Claims Act, principally 28 U.S.C. 1346(b), 2401(b), 2402, 2671-80.

9. Defendant Ronald W. Reagan is President of the United States, Commander-in-chief of the armed forces and a member of the National Security Council. He is being sued in his individual and official capacities.

10. Defendant Margaret Thatcher is Prime Minister of the United Kingdom. She is being sued individually and in her official capacity.

11. Defendant Caspar W. Weinberger was the Secretary of Defense and a member of the National Security Council when the U.S. air strike on Libya was planned, approved, ordered, implemented and carried out. He is being sued individually and for action taken in his official capacity.

12. Defendant Admiral William J. Crowe, Jr., USN, was Chairman, Joint Chiefs of Staff and a member of the National Security Council when the U.S. Air strike on Libya was planned, approved, ordered, implemented and carried out. He is being sued individually and in his official capacity.

13. Defendant General Charles A. Gabriel, was Chief of Staff of the Air Force when the U.S. air strike on Libya was

planned, approved, ordered, implemented and carried out. He is being sued individually and in his official capacity.

14. Defendant General Bernard W. Rogers, U.S. Army, retired, was United States Military Commander in Europe and was in charge of the Air Force and Navy aircraft that carried out the U.S. air strike on Libya.

15. Defendant Admiral Frank B. Kelso, Jr., was Vice-Admiral in command of the United States Sixth Fleet, USN, that carried out the air strike on Libya.

16. The legal representative of the Estate of William J. Casey is named as a defendant. Mr. Casey was the Director of the Central Intelligence Agency and a member of the National Security Council when the U.S. air strike on Libya was planned, approved, ordered, implemented and carried out. He is being sued in his representative capacity for liabilities incurred by Mr.

Casey individually and in his official capacity.

17. John Doe, Ruth Roe et al. are defendants whose identities and precise roles have yet to be ascertained. They are individuals who personally planned, approved, ordered, implemented or carried out the air strike on Libya, including without limitation, officers who flew in command of the Air Force and Navy units that dropped the bombs on Libya.

18. The defendants who are present or former civilian or military officers and officials of the United States are sometimes referred to in this complaint as the federal defendants.

19. On the night and early morning of April 14-15, 1986, aircraft of the United States Air Force and Navy conducted a surprise, clandestine bombing attack on the nation of Libya.

20. The aircraft were launched from U.S. bases in Great Britain and from U.S. aircraft carriers in the Mediterranean Sea.

21. Upon information and belief, defendant Thatcher gave the United States permission to use American bases in the United Kingdom to launch the attack on Libya knowing that the attack was illegal and would necessarily kill civilians.

22. Upon information and belief, other nations were requested by the United States to participate or grant permission in some way for the attack on Libya. These requests were refused. For example, France refused permission for the aircraft launched from the United Kingdom to fly over its territory, which would have been the direct route from the United Kingdom to Libya. This greatly increased the difficulty of the flight and the risks of heavy civilian casualties in the bombing as defendants well knew.

23. The United States aircraft dropped bombs on and near the Libyan capital, Tripoli, the city of Benghazi, and the air base at Benina.

24. Much damage was done to civilian areas. Many civilian men, women and children were killed or injured, including plaintiffs in this action and their decedents. Much civilian property was damaged or destroyed.

25. Several embassies were damaged.

26. Upon information and belief, the decision to have U.S. aircraft bomb Libya was made by President Reagan at the California White House on or about April 5, 1986.

27. Upon information and belief, plans for the attack on Libya were developed by the Joint Chiefs of Staff, the National Security Council, the Office of the White House and other agencies. The federal defendants met and communicated with one

another and otherwise participated directly in planning, approving, ordering, implementing or carrying out the air strike upon Libya described in this complaint. This was done by the federal defendants in the District of Columbia, California, Virginia and elsewhere within and outside the United States.

28. Upon information and belief, the primary purpose, or a primary purpose of the bombing of Libya described in this complaint which the federal defendants shared, or knew or should have known, was to kill the head of state of Libya, Col. Muammar Qaddafi, and to terrorize Libyans by inflicting injury upon the civilian population in order to undermine support for the government of Col. Qaddafi and to cause or encourage his overthrow. This purpose, which the federal defendants sought to conceal and deny, was illegal and for this reason, among others, the actions of the

federal defendants in planning, approving, ordering, implementing or carrying out the air strike upon Libya described in this complaint, whether or not done within the scope of their employment, were unauthorized and contrary to statutory and constitutional prescription. In their actions taken in their official capacities the federal defendants acted under color of law but beyond or contrary to their lawful authority and in an unconstitutional manner.

29. At the time of the bombing of Libya described in this complaint no state of war existed between the United States and Libya. No law of the United States and no international law authorized, justified or permitted United States aircraft as they did to violate the territorial integrity and air space of Libya by entering it for military purposes, nor to drop bombs upon Libya for any purpose, nor to drop bombs that hit and injured civilians and destroyed civilian

property, nor to drop bombs directed at the head of state and civilian areas for the purpose of killing the head of state and killing and injuring civilians.

30. Upon information and belief, under all of the circumstances pertinent to the bombing of Libya described in this complaint, including without limitation, the size and technology of the ordnance used, the high speed and low altitude of the aircraft and other conditions affecting delivery of the bombs, and the concentration of civilians in and around Tripoli, Benghazi and Benina Air Base, it was inescapable that civilian casualties and damages to civilian property would result from the attack. Defendants knew or should have known of this certainty of harm.

31. Defendants and others entered into and carried out a conspiracy, aided and abetted one another and others, and acted jointly and in concert to bring about the

illegal U.S. bombing of Libya described in the complaint. Their actions in so doing, in planning, approving, ordering, implementing and carrying out the air strike, were done in the District of Columbia, California, Virginia and elsewhere in the United States, as well as in Libya, the United Kingdom and elsewhere outside the United States. These actions were a proximate cause of the deaths, injuries and property damage in Libya for which plaintiffs are seeking to recover their damages in this action. Each defendant is directly liable for his own illegal, tortious acts and is vicariously liable for the illegal, tortious acts of the other defendants and third persons with whom he conspired, or acted in concert or aided and abetted. All defendants are liable for the deaths, injuries and property damage in Libya for which plaintiffs are seeking to recover their damages in this action.

FIRST CLAIM

32. Plaintiffs incorporate by reference the preceding allegations of this complaint.

33. Defendants' actions as aforesaid constitute torts cognizable under 28 U.S.C. 1350 or 28 U.S.C. 1331 or both in violation of the law of naticns and treaties of the United States as established by the authorities described in paragraph 3 and 4 of this complaint and other pertinent treaties, declarations, documents, and practices constituting settled principles of the customary international law of human rights, the law of nations and treaties of the United States.

SECOND CLAIM

34. Plaintiffs incorporate by reference the preceding allegations of this complaint.

35. Defendants' actions as aforesaid constitute torts cognizable under 28 U.S.C.

1350 or 28 U.S.C. 1331 or both in violation of the Constitution, laws and treaties of the United States, as evidenced by the authorities described in paragraphs 3 and 4 of this complaint, and other relevant provisions of the Constitution, laws and treaties of the United States.

THIRD CLAIM

36. Plaintiffs incorporate by reference the preceding allegations of this complaint.

37. Defendants' actions as aforesaid constitute violations of the tort law of Libya, the District of Columbia, California, Virginia and other States.

FOURTH CLAIM

38. Plaintiffs incorporate by reference the preceding allegations of this complaint.

39. Defendants' actions as aforesaid constitute violations of international law

as described in paragraph 3 of the complaint.

FIFTH CLAIM

40. Plaintiffs incorporate by reference the preceding allegations of this complaint.

41. Actions of the federal defendants are aforesaid done in California, Virginia, the District of Columbia and elsewhere in the United States within the scope of their federal employment were a proximate cause of the injuries sustained by plaintiffs and their decedents in the U.S. bombing of Libya described in the complaint for which the United States is liable under the Federal Tort Claims Act.

SIXTH CLAIM

42. Plaintiffs incorporate by reference the preceding allegations of this complaint.

43. Upon information and belief, it is being claimed on behalf of the United States

that American bombs erroneously and inadvertently hit civilian areas in the raid on Libya on April 14-15, 1986. The Pentagon made such an announcement in May 1986. Given these statements in the nature of admissions, it was clear error and a violation of a mandatory duty for the United States Air Force to deny the administrative claims of plaintiffs which it considered under the provisions of the Foreign Claims Act, 10 U.S.C. 2734. The regulations of the Air Force for claims under the Foreign Claims Act flatly state, 32 CFR 842.64(m): "...Pay claims arising from accident or malfunction of aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from a combat mission."

44. Plaintiffs are therefore entitled to an order in the nature of mandamus directing the federal defendants now in office to cause the Air Force to vacate its

denial of plaintiffs' claim and to reconsider and pay the claims.

SEVENTH CLAIM

45. Plaintiffs incoporate by reference the preceding allegation of this complaint.

46. The actions of the federal defendants as aforesaid constitute a pattern of racketerring activity within the meaning of Title IX of the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations ("RICO"), in that defendants have committed at least two acts of racketeering activity enumerated in 18 U.S.C. 1961(1) (A) and (B) in the course of the concerted action and conspiracy against Libya, its Head of State and its people described in this complaint, and in previous overt and covert hostile attacks and other illegal and criminal actions by the federal defendants, or some of them, against Libya, its Head of State and its people.

47. Each of the federal defendants committed at least two such racketeering acts, or aided and abetted in their commission or is otherwise vicariously responsible for their commission.

48. The concerted action and conspiracy against Libya, its Head of State and its people described in this complaint is an enterprise within the meaning of 18 U.S.C. 1961(4), affecting interstate and foreign commerce, which also includes the association in fact of the federal defendants and others in planning, approving, ordering implementing and carrying out previous overt and covert hostile attacks and other illegal and criminal actions against Libya, its Head of State and its people.

49. The federal defendants as persons employed by and associated with the aforesaid enterprise conducted or participated, directly or indirectly, in the

conduct of the enterprise's affairs through a pattern of racketeering activity and conspired to do so in violation of 18 U.S.C. 1962(c) and (d).

50. The federal defendants' violations of 18 U.S.C. 1962(c) and (d) proximately causes injuries to the business and property of plaintiffs and their decedents.

WHEREFORE plaintiffs pray for judgment against defendants for compensatory and punitive damages in the amounts the proof shall establish, trebled for plaintiffs' claims under RICO, except that no punitive damages are sought against the United States under the Federal Tort Claims Act, together with reasonable attorneys fees, interest, costs and disbursements, and alternatively for the order described in the complaint causing the Air Force to vacate its denial

and to reconsider and pay plaintiffs' administrative claims.

Dated: New York, N.Y.

April 12, 1988

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